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George K. Schoney and Erma J. Schoney, et al., v. Memorial Estates, Inc., et al. : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

GEORGE K. SCHONEY and ERMA J. SCHONEY, et al. Plaintiffs/Appellants, vs. MEMORIAL ESTATES, INC., et al., Defendants/Respondents.	REPLY BRIEF Case No. 880630-CA Category No. 16(b)

On Appeal From The Third District Court Salt Lake County

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SUMMARY OF ARGUMENT

This case is seven years old. After a number of delays and superficial rulings, Judge Moffat granted summary judgment for Memorial Estates. The trouble is that he didn't bother to read the file. The summary judgment was granted on the broadest possible grounds.

Because of the unusual treatment in the trial court, Schoney was required to brief all possible theories in this complex case. Because of a computer failure, Schoney's final 79-page brief was delayed. This Court struck the 79-page brief and received, instead,a 30-page preliminary draft brief.

However, the 30-page brief did not include treatment of the class issues. Therefore, by striking the 79-page final brief, this Court effectively dismissed a putative class. Such a dismissal violates due process standards established by the United States Supreme Court, as well as Utah Rule of Civil Procedure 23(e), which states:

> A class action may not be dismissed or compromised without the approval of the Court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the Court directs.

IV.

ARGUMENT

DUE PROCESS CONCERNS HAVE ARISEN IN THIS CASE

A. Introduction

This will not be a traditional reply brief. The procedural history of this case is so unusual that a traditional brief is not possible.

Specifically, recent rulings of this Court raise serious due process issues. Schoney is obligated to advise the Court of such due process issues at the earliest possible time. See Sparrow v. Reynolds, 646 F. Supp. 834 (D.C.D.C. 1986); Cf. Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975 (1967).

Furthermore, error is often cumulative. See In Re: Santrucek, 145 N.E. 739 (1924) (per Justice Cardozo); Allett v. Hill, 422 So.2d 1047 (Fla.App. 1982); Wiedower v. ACF Industries, 763 S.W. 2d 333 (Mo.App. 1988). Therefore this reply brief will present the due process issue in the context of the overall case.

B. Delay

This case was filed on June 14, 1982. The case has been set and reset for trial six times! Schoney was responsible for one continuance due to a change in staff. (R. 510-513.) The other continuances were granted for the convenience of the court or the convenience of Memorial Estates. Several of the delays were from first place trial settings. (See Chronology at Brief of Appellant, p. 8-9.) Twice Schoney sought assignment of a special judge to avoid such delays. (R. 522, 1085.) Neither request was granted.

If this case is remanded, it will likely take another year to get on the trial calendar, and perhaps two years to process an appeal from the trial. When the Schoneys first walked into a lawyer's office seven years ago, little did they realize that it would take a decade to process their modest claim.

C. Class Certification and Motions to Enlarge the Class

Early in the litigation, the trial court judge (Fishler) certified the case to proceed as a class action. (R. 186, 202-204.)

The original class certification was based upon rather narrow theories. (See R. 202-204.) Therefore, Schoney made a motion to enlarge the class to include the additional theories and additional parties. (R. 278.) At about the same time, Memorial Estates made a motion to decertify the class. (R. 487.)

Judge Dee ruled first on the decertification motion. (R. 726, p. 1 & 2.) Judge Dee granted that motion to decertify the class.[1] Next, Judge Dee entertained arguments on the motion to enlarge the class.[2] (R. 726, p. 1-3.)

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[1] The theory of liability was that Memorial Estates sold space in non-existent mausoleums, and that Memorial Estates delayed construction for up to ten years. (See R. 2.) Judge Dee limited the potential class to 26 persons. Apparently only 26 persons signed the same form of contract as Schoneys.

Even though the contract form changed slightly, Schoney presented nearly 300 contracts from customers who were victims of the same course of conduct. (R. 727-991.)

As a part of that same scheme, Memorial Estates issued deeds in non-existent mausoleums. Schoney identified 68 identical deeds for Mountain View and 147 identical deeds for Redwood. (R. 628-629.)

[2] Since the class was then decertified, Schoney verbally amended the Motion to Enlarge the Class, to be a Motion to Recertify the Class based upon the new theories of liability. (See R. 726 at p. 3.)

Memorial Estates argued that the Motion to Enlarge the Class presented no new theories.

> MR. SWOPE: Your Honor, it's in the Amended Complaint, the Second Amended Complaint, which has been before this Court since June 1983, Count V, Breach of Contract to Provide Chapel. It's been before the Court. Count VI, Breach of Trust. It's been before the Court. Count VII, Breach of Statutory Trust. It's been before the Court. Count VIII, Invasion of Trust Corpus. Count X, Failure to Establish a Statutory Trust. All these have been before the Court. These are not new issues. (Emphasis added.)

(R. 726, p. 8.)

The Court agreed with Memorial Estates. The Court denied the Motion to Enlarge the Class. However, the Court's ruling did not go to the merits. The Court simply concluded that the Motion to Enlarge the Class had already been considered:

> And the date of my decision (to decertify the class) being last Tuesday covers all of the things that have been done so far. . . So I've considered all of these new theories, and I am denying your Motion to Enlarge the Class for the three theories, which are not new theories. They have already been considered. They are in writing in the file. And I'm decertifying the class. (Emphasis added.)

(R. 726, p. 11-12.)

In short, Judge Dee (second judge) simply side-stepped the issue. It is abundantly clear that the Motion to

Decertify the Class presents wholly different issues from the Motion to Enlarge the Class. (Compare R. 202-204; R. 280-285; and R. 487-492.) Rather Judge Dee (second judge) simply followed the misleading statement of Memorial Estates' counsel.[3]

D. Repeated Application For Summary Judgment

After waiting literally six years to get a trial date (See para. B above) and after the class was dismissed under unusual circumstances (See C above), the eve of the trial finally approached. By now a third judge was on the scene (Moffat).

Memorial Estates filed a motion for summary judgment. (R. 1363.) The Motion for Summary Judgment was granted. (R. 1377.) This appeal followed.

The problem is that this was Memorial Estates' third try at summary judgment. Twice before Memorial Estates had filed -- and lost summary judgment motions. (R. 700 and R. 1301.) The third Motion for Summary Judgment was in all material respects exactly the same as the first two motions for summary judgment. (Compare R. 472; R. 1200; and R. 1363.)

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[3] [Mr. Swope for Memorial Estates] "All these have been before the Court. These are not new theories." (R. 726, p. 8.)

In short, Memorial Estates' judge shopping finally paid off and they found a judge who would agree with their theories. The problem is that such judge shopping is a square violation of §78-7-19, Utah Code Ann.

> If an application for an order. . . is refused in whole or in part. . . no subsequent application for the same order can be made to any other judge, except of a higher court.

E. Failure to Review the Record

Undaunted by the fact that the same motion had been heard on two prior occasions, (See Para. D above) Judge Moffat forged ahead. The problem is that Judge Moffat didn't bother with the nicety of reading the file. After two other judges had managed this complex case for over six years, Judge Moffat casually mentioned:

> . . . We have a Motion for Summary Judgment. Haven't had a chance to look at the file. . .

(June 21, 1988 Transcript at p. 2, Lines 4-5.)

Thus Judge Moffat could not follow his duty to, "... carefully scrutinize the submissions and contentions..." Rich v. McGovern, 551 P.2d 1266 (Utah 1976). Under lesser circumstances, federal courts have reversed summary judgments. Keiser v. Coliseum Properties, Inc., 614 F.2d 406 (5th Cir.

1980); Stepanischen v. Merchants Despatch Transp. Corp., 722 F.2d 922 (1st Cir. 1983).

During the course of the summary judgment hearing, numerous fact issues were examined: viz. whether defendant's interrogatories were lost or delayed in the mail (June 21, 1988 Tr. p. 5, Lines 18-25); whether Memorial Estates had ever made a suggestion of death on the Record (June 21 Tr. at p. 11, Lines 17-20; p. 12, Lines 10-13); whether an offer of judgment in the sum of $4,000 would satisfy all of Schoney's claims (June 21 Tr. at p. 14, Lines 7-11); whether Schoneys were shown a picture of the mausoleum before it was constructed (June 21 Tr. at p. 15, Lines 2-13); whether the Schoneys were shown a rendering of a mausoleum at Redwood Road or Mountain View (June 21 Tr. at p. 16, Lines 20-25); whether the mausoleums at Mountain View and Redwood Road were substantially the same (June 21 Tr. at p. 17, Lines 11-15); whether the construction of a mausoleum at Redwood Road put the Schoneys on notice that a later mausoleum at Mountain View would be of the same quality (June 21 Tr. at p. 18, Lines 6-10); whether a chapel has always been available at Mountain View (June 21 Tr. at p. 18, Line 22 - p. 19, Line 5); whether it was reasonable for Schoneys to purchase an alternate mausoleum space (at Sunset Lawn) (June 21 Tr. at p. 27); whether Memorial Estates

sold more crypts than had been constructed (June 21 Tr. at p. 31, Lines 1-4); whether the Schoneys purchased a mausoleum at Redwood Road or Mountain View (June 21 Tr. at p. 36 and 37); whether Memorial Estates properly accounted for trust funds (June 21 Tr. at p. 43, Lines 8-22); whether Memorial Estates held a dead corpse as a hostage (June 21 Tr. at p. 46, Lines 1-9); whether Memorial Estates told Schoneys that their money would be held in trust (June 21 Tr. at p. 46, Lines 10-19); whether Memorial Estates represented that a mausoleum would be built when there were no plans to do so (June 21 Tr. at p. 47, Lines 1-7); whether it was reasonable for Memorial Estates to substitute an LDS chapel for the Schoneys, who were a non-LDS family (June 21 Tr. at p. 48, Lines 12-22); whether a chapel was available at both Mountain View and Redwood Road (June 21 Tr. at p. 51, Lines 1-3); whether Memorial Estates was prejudiced[4] because Schoney answered interrogatories approximately 15 days late.[5] (June 21 Tr. at p. 5, Lines 1-15.)

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[4] Memorial Estates was guilty of numerous discovery delays much more serious than 15 days. (See Brief of Appellant at p. 7.)

[5] Memorial Estates argued that the case of W.W. & W.B. Gardner v. Parkwest Valley, 568 P.2d 734 justified dismissal as a sanction. (June 21 Tr. at p. 4-5.) Without reading the case, Judge Moffat held that the Gardner case "requires" dismissal. (June 21 Tr. at 51.)

In summary, it was clear error for Judge Moffat to grant summary judgment in such a complicated case, and in face of numerous fact issues, without even reading the file.

F. Refusal to Permit Schoneys to File a Complete Brief

After losing in the trial court, Schoneys appealed. The legal theories were numerous and complex. At the conclusion of oral argument, Judge Moffat stated:

> I think Mr. Peck's motions are well taken in every instance. . .

(June 21 Tr. at p. 51.)

That simple statement covers a lot of territory. Such a shotgun ruling, ". . . made without a deliberate articulation of its rationale, including some appraisal of the factors underlying the court's decision [does not] allow for a disciplined and informed review of the Court's discretion." Sargeant v. Sharp, 579 F.2d 645, 647 (1st Cir. 1978). Compare Rule 52(a), Utah Rules of Civil Procedure.[6] In short, Schoney was left to brief all possible issues in a very complex case.

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[6] "The Court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules . . . 56. . . when the motion is based on more than one ground."

Schoney filed a 30 page preliminary draft brief, and moved for an additional five working days to file the final brief. The grounds for the motion were that the word processing equipment had broken down. (Motion and Order to File Brief with Leave to File Substitute Brief, dated February 10, 1989.) That motion was denied. (Order, dated March 7, 1989.) See Exhibit A.

With one exception, Schoney does not wish to reargue the substance of that order -- nor would it be proper to do so. However, one aspect of that order raises due process concerns.

Schoneys filed a 30 page preliminary draft brief. In connection with that filing, Schoney specifically noted that:

> Appellant's counsel has prepared a brief and motion to file with leave to substitute Exhibits A and B hereto are drafts of both. The draft of the brief is not the current one; the current one is in the word processor memory. At about 9:00 a.m. today, February 10, 1989, the office printer broke down. . .(Emphasis added.)

(Motion to File Brief with Leave to File Substitute Brief, dated February 10, 1989.) The motion was attested by the manager of the word processing department.

This Court's order of March 7, 1989 did not permit Schoney to file the version of the brief that was finished--albeit locked in a broken down computer. Rather, this Court's order stated:

> It is further ORDERED that the draft brief filed on 10 February, 1989 shall comprise Appellant's Brief. Appellant shall have the draft bound and shall file the bound brief before 10 March, 1989.

(Order, 7 March, 1989.)

In summary, Schoney was faced with an awesome task to summarize six years of litigation in a final appellate brief. The task was especially difficult because of the superficial treatment of issues, and shotgun rulings below. (See Para. C, D, E, above.) Schoney had in fact written a complete brief.[7] However, because of an equipment failure, Schoneys were not permitted to file that complete brief.

G. Dissolution of Class

The 30 page brief filed on February 10 did not include a treatment of class issues. The final 79 page brief,

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[7] Schoney believes that the Brief which was locked in the computer on February 10, 1989 was, in fact, the 79 page Brief dated 21 February, 1989 (which was rejected by this Court.) However, the attorney in charge of the file has been fired for his mishandling this appeal. Thus, it may not be possible to reconstruct exactly what was in the computer on February 10, 1989.

which was rejected by this Court, did include a treatment of the class issues.

Without regard to fault or error,[8] the result is that the putative class has disappeared. However, that violates due process rights of the putative class members.

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306; 70 S.Ct. 652 (1950).

Although Mullane was not a class action, it provides the due process touchstone for all class actions, see Phillips Petroleum v. Shutts, 472 U.S. 797, 812 (1985). In order to implement those due process considerations, Rule 23(e) Utah Rules of Civil Procedure states:

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[8] This Court apparently views the issue as being Schoney's fault for trying to make substantive changes after a brief was filed pursuant to the Court's "Lodging Policy". See Order, 7 March, 1989. On the other hand, Schoney views the issue as clear error. Schoney contends that the February 10, 1989 filing had nothing to do with the "Lodging Policy". (That policy has never been promulgated.) Rather, it was a garden variety showing of "good cause" for an enlargement of time pursuant to Rule 22(b), Rules of the Utah Court of Appeals. (See Schoneys' Motion for Review, dated 9 March, 1989.)

> A class action shall not be dismissed or compromised without the approval of the Court, and notice of the dismissal or compromise shall be given to all members of the class in such manner as the court directs. (Emphasis added.)

Due process considerations require that Rule 23(e) should apply even where the class has not been certified if there is any prejudice to absent class members. Simer v. Rios, 661 F.2d 655 (7th Cir. 1981).

In this case, absent class members are prejudiced because they might choose to file individual claims if they were aware that the class was dissolved. Furthermore, this Court has failed to even consider Rule 23(e) in connection with the dismissal (or dissolution) of the class.[9]

V.

CONCLUSION

This case has been fraught with delay and superficial treatment by the trial court. The cumulative error required Schoney to write a far reaching brief on every possible aspect

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[9] It is no solution for the Court to simply blame Schoney's counsel. Due process requires that the named plaintiff at all times adequately represent the interests of the class. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985).

of the case. Schoney accomplished that formidable task in a reasonable time. Because of equipment failure the final draft of the brief was delayed. This Court struck Schoney's final brief, and with that ruling the class also fell.

The totality of these circumstances has deprived putative class members as well as Schoney of their due process rights.

The only solution is to remand to the trial court for total reprocessing of the class issues and the summary judgment issues.

DATED this 20 day of July, 1989

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Appellant

BY: _____
ROBERT J. DEBRY

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed four true and correct copies of the foregoing REPLY BRIEF, postage prepaid, this 20 day of July, 1989 to the following:

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SP8-042/ljf/ek

EXHIBIT A

The lodging policy in effect in February 1989, provided appellant five additional working days to correct technical defects and to file a substitute brief. Appellant failed to file a substitute brief within the five day period. By correspondence dated 16 February 1989, the Court notified appellant that the brief was in default and that the appeal could be dismissed unless a substitute brief was filed by 24 February 1989.

Appellant's substitute brief was filed on 21 February 1989. The brief, exclusive of the table of contents, table of authorities and appendix, is 79 pages in length. Appellant's corrections go to the substance of the brief as well as to defects which may be addressed under the lodging policy. Thus, the substitute brief is improper.

Now, therefore, it is hereby ORDERED that appellant's Motion To File Overlength Brief is denied. It is further ORDERED that the draft brief filed on 10 February 1989 shall comprise appellant's brief. Appellant shall have the draft bound and shall file the bound brief, together with seven copies, on or before 10 March 1989. Although the overlength brief is not accepted, the Appendix To Appellant's Brief, filed 21 February 1989, is accepted.

IN THE UTAH COURT OF APPEALS

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George K. Schoney and Erma J. Schoney, et al.,	)	
Plaintiffs and Appellants,	)	ORDER
v.	)	Case No. 880630-CA
Memorial Estates, Inc.,	)	
Defendants and Respondents.	)	

This matter is before the Court upon (a) appellant's several motions for extensions to file appellant's brief, (b) appellant's Motion To File Overlength Brief, filed 21 February 1989, (c) respondent's Motion To Dismiss, filed 21 February 1989 and (d) appellant's Motion To Refer Motion To Dismiss, filed 1 March 1989.

On 10 February 1989, appellant filed a 30 page brief, in draft form, together with a Motion To File Brief With Leave To File Substitute Brief. Thereafter, on 21 February 1989, appellant filed a Motion To Extend Time For Filing Substitute Brief and a Motion To File Overlength Brief.

The substitute brief was filed pursuant to the Court's internal policy for lodging briefs. The purpose of the policy is to permit a party, who makes a good faith effort to timely file a brief, extra time to correct technical defects in the brief. Technical defects include improper covers, inadequate binding or lack of binding, incorrect pagination, and etc. The lodging policy does not provide an opportunity to amend the substance of the arguments contained in the brief.

COPY

It is also ORDERED that respondent's Motion To Dismiss is denied. Respondent's brief shall be due thirty days from 10 March 1989. That is, respondent shall file its brief on or before 9 April 1989. Further, it is ORDERED that appellant's Motion To Refer Motion To Dismiss is denied.

Dated this 7th day of March 1989.

BY THE COURT:

Russell W. Bench

Judge Russell W. Bench